Supreme Court, U.S.
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No. 92-1239

In The

Supreme Court of the United States

October Term, 1993

J.E.B.,

Petitioner,

v.

T.B.,

Respondent.

On Writ Of Certiorari
To The Supreme Court
Of The State Of Alabama

PETITIONER'S REPLY BRIEF

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ARGUMENT I

THE USE OF GENDER-BASED PEREMPTORY JURY STRIKES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The state rests its justification for supporting the use of gender-based peremptory jury strikes upon the premise that gender discrimination is inherently less important than racial discrimination. (Resp. Br. at 9). There is no basis within the framework of this Court's interpretation of the Fourteenth Amendment for such a conclusion. As discussed in Petitioner's opening Brief on the Merits, gender discrimination has no place within the court system. The principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), apply equally to racial and gender classifications since they share many of the same characteristics: (1) race and gender are immutable characteristics that are readily identifiable and can not be changed; (2) both characteristics have historically been used as a basis for discriminatory treatment in the jury system because of their membership in an identifiable group; and (3) both classifications have been used in the past to restrict representation in the political process.[1]

The State also offers the argument that the extensive history of discrimination against women within the jury system is somehow irrelevant to the use of discriminatory

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[1] Despite the State's argument to the contrary, *Batson* did not turn upon the strict scrutiny afforded racial classifications. In any event, this Court has yet to "decide whether classifications based upon gender are inherently suspect." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982).

peremptory strikes against males.[2] The State's narrow view of this *gender* discrimination case should be rejected. As a matter of law, even though the Petitioner in this case challenged the use of peremptory strikes against males rather than against females, it is the *gender classification* which is subject to heightened scrutiny. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723; *see also Caban v. Mohammed*, 441 U.S. 380, 394 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979). Moreover, when males or females are stricken based solely upon their gender, the striking litigant necessarily perpetuates stereotypes of both groups. In fact, the State's position emphasizes how gender stereotypes are mutually reinforcing.[3] The State invokes remarkable stereotypes about *both* men and women in offering a defense to gender-based peremptory strikes in this case. The State argues that there is a "reasonable perception" that men are more "sympathetic and receptive to arguments of a man" while women are "more sympathetic and receptive to complaining witnesses who bore the child." (Resp. Br. at 10-11). The State's attempt to support these perceptions with certain "studies" does not

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[2] The State specifically argues that the "[a]pplication of the rule to the present case will not further the interest of overcoming historic discrimination against women, since the Petitioner in this case alleges discrimination against men." (Resp. Br. at 6, 24).

[3] See note, *Beyond Batson: Eliminating Gender Based Peremptory Challenges*, 105 Harv. L. Rev. 1920, 1938 (1992): ("[S]tereotypes of male and female characteristics tend to be binary and hence mutually reinforcing. Thus, women are implicated when a state actor stereotypes a perspective male juror as 'hard-boiled,' and male jurors are affected in a similar way when female jurors are presumed to be 'emotional' ".)

make them any less stereotypes or over-broad generalizations. The use of gender as a proxy for individual characteristics rests on stereotypes in the same way that the use of race as a proxy did in *Batson*. It is the individual "qualifications and ability" of a potential juror to serve in a particular case which must govern that juror's selection or rejection by the litigants, not some presumption about how men or women as a group may be predisposed to think or react to a particular situation. *Batson v. Kentucky*, 476 U.S. at 79, 81. The Alabama Supreme Court, in dealing with the implementation of *Batson*, has condemned the stereotyping commonly engaged in by trial counsel when "[t]he record is sparse on any attempt to ascertain the struck juror's *individual bias* in [a] particular case." (emphasis added) *Ex parte Branch*, 526 So. 2d 609, 626 (Ala. 1987).[4] In promoting its position, the State falls prey to perpetuating the very stereotypes the Equal Protection Clause prohibits.[5]

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[4] Justice Maddox of the Alabama Supreme Court has summarized the impact of *Batson* on jury trials by stating that "one of the basic foundation stones of the *Batson* decision [is] the right of citizens to serve on a jury and not be excluded for a reason unrelated to the case to be tried. Compliance with *Batson* was intended to ensure public confidence in the integrity of the jury system". He went on to further pose that "*Batson* turned the traditional method of striking jurors based on stereotypes completely on its ear." (emphases added) Justice Hugh Maddox, *Batson: From an Appellate Judges Viewpoint*, The Alabama Lawyer, No. 5 (September 1993).

[5] The State seeks to limit Petitioner's right to exercise his equal protection rights by questioning Petitioner's peremptory challenge of women jurors. Such argument is not well taken. Petitioner recognizes that the principles of nondiscrimination apply equally to *both* adversaries in a judicial proceeding.

ARGUMENT II

THE STATE HAS FAILED TO SHOW THAT ITS PROFFERED STATE INTEREST IS FURTHERED BY THE DISCRIMINATORY USE OF GENDER-BASE PEREMPTORY STRIKES.

The State concedes that gender-based distinctions can only be upheld if the proponent of the discriminatory action can prove that such action is substantially related to a sufficiently important governmental interest. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723 (1982); *Craig v. Boren*, 429 U.S. 190 (1976). The State offers as its substantial state interest supporting discriminatory, gender-based peremptory jury strikes the establishment of the paternity of children born to unwed mothers. However, the State has made no attempt to show that this proferred interest will be at all furthered by allowing discriminatory gender-based peremptory strikes.

The State's purported justification for gender discrimination in the use of its peremptory jury strikes could only apply to a very narrow subset of cases in Alabama. The issue of peremptory strikes based upon gender is much broader than paternity cases. The interest of the government in *every* proceeding before the Judicial Branch of government is to see that the proceedings are carried out in a fair, impartial and nondiscriminatory manner. Purposeful discrimination in the selection of a

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However, Petitioner's use of peremptory strikes, whether discriminatory or not, is irrelevant to the issues put before this Court. The State failed to object or to challenge Petitioner's use of his peremptory strikes prior to the jury being empaneled and sworn, and thus waived any such objection.

jury "harms the excluded jurors and the community at large." *Powers v. Ohio*, 111 S.Ct. 1364, 1368 (1991) (citations omitted). In *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) the Court offered the opinion that "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it". (112 S. Ct. 2354). Likewise, in *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) this Court stated that "[b]y enforcing a discriminatory peremptory challenge, the court has elected to place its power, property and prestige behind the alleged discrimination". *Id.* at 2085 (citations omitted). Therefore, the interest of the State of Alabama in every case is not supported by the use of gender-based peremptory challenges, but is, in fact, harmed by such discriminatory practice.

The State attempts to inject into this case an irrelevant factor to defeat the equal protection rights of both men and women, that being the purported historical discrimination against illegitimate children and their mothers. (Resp. Br. at 12). In doing so, the State attempts to pit the protection afforded to the gender-based peremptory challenges against this historical discrimination against illegitimate children. This argument improperly assumes that the interests between these two groups are adverse. In fact, the selection of an impartial jury, – one chosen without resort to gender discrimination – is fully consistent with the State's purported interest in establishing paternity through a fair trial.

Finally, the State's entire argument in trying to support gender-based peremptory strikes falls of its own

weight because it provides as a defense to gender discrimination "the very stereotype the law condemns." *Powers v. Ohio*, 111 S. Ct. at 1370 (1991). The State argues that gender-based peremptory strikes are acceptable because it has been "shown" that men are more "sympathetic and receptive to the arguments of a man" while women are "more sympathetic and receptive to the complaining witness who bore the child." (Resp. Br. at 10-11). Despite the State's reliance upon the "reasonable perceptions" of jurors, gender is simply irrelevant to whether a person is qualified to serve on a particular jury. Like racial classifications, the characteristic of gender is irrelevant to jury service as a matter of law. Like racial classifications, gender is not a good proxy for determining the "extremes of partiality," as suggested by the State.

Even if gender were a good predictor in this particular type of case, and certainly it is not, there is no basis for concluding that gender is a predictor of juror bias in all cases. Prohibiting gender-based peremptory strikes will not interfere with the traditional right of litigants to strike jurors they have an articulated non-discriminatory basis for believing to be truly biased, but who may not be excused for cause. The *Batson* principles simply eliminate gender as a proxy for presuming bias. Gender-based strikes thus lack a "direct, substantial relationship" to the State's claimed interest since the discriminatory strikes perpetuate the "application of traditional, and often inaccurate, assumptions about the proper roles of men and women." *Mississippi Univ. for Women*, 458 U.S. at 725-26 (citations omitted).

ARGUMENT III

ANY ADDITIONAL ADMINISTRATIVE BURDEN LEVIED UPON THE JUDICIAL SYSTEM BY THE EXTENSION OF *BATSON* TO GENDER-BASED PEREMPTORY CHALLENGES CAN BE ABSORBED BY THE SAME PROCESS NOW BEING APPLIED BY THE COURTS TO RACE-BASED CHALLENGES.

The State of Alabama takes the position that allowing litigants to challenge gender-based peremptory jury strikes would impose an undue burden upon the judicial system, "slowing down litigation at every level of the proceedings." (Resp. Br. at 19). To take this position, one must first concede, as the State appears to do,[6] that the use of gender-based peremptory jury strikes violates the Equal Protection Clause, and then take the further position that such violation of the constitutional rights of the litigant and the excluded jurors is justified because of the administrative inconvenience which might be caused by correcting the situation. Such position has been thoroughly rejected by this Court. Despite the adverse impact upon government functions, this Court has repeatedly "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Craig v. Boren*, 429 U.S. at 198; *see also Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). Indeed, *Batson* itself rejected arguments based upon administrative inconvenience. *Batson*, 476 U.S. at 99.

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[6] The State concedes that J.E.B is entitled to have the heightened scrutiny test applied to his challenge of gender-based peremptory jury strikes. (Resp. Br. at 12).

Even assuming that there is some "administrative inconvenience" caused by an extension of the *Batson* principles, Federal and State Courts have developed considerable experience with applying these principles in the context of race. Justice Maddox, in a special concurring opinion in *Huntley v. State*, No. 1910530. 1992 Ala. LEXIS 1178 (Ala. Sept. 18, 1992) (corrected March 10, 1993; second correction May 21, 1993) set out several suggestions for eliminating many of the "Batson-generated problems.[7] The State also ignores the fact that the Ninth Circuit and

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[7] "(1) Requiring prospective jurors, when they are summoned to appear or when they assemble, to fill out a written questionnaire that would provide substantial background information to the parties to use in exercising their peremptory strikes. In addition to a general questionnaire, the parties might have specific questions, because of the particular nature of the case to be tried, that they would want prospective jurors to answer.

"(2) Limiting the number of peremptory strikes available by limiting the size of the venire from which the parties begin striking. In a majority of civil and criminal cases, the rules of procedure only require 24 qualified jurors to be on the panel when the parties begin to exercise their peremptory challenges.

"(3) Adopting the rule used in Federal courts that prohibits so-called 'back striking; that is, placing 12 qualified prospective jurors in the jury box, and having the parties decide how many of those 12 they separately and severally want to strike. If a prospective juror was not removed from the box by either side that juror could not be removed later."

Huntley v. State, 1993 Ala. LEXIS 1178, at 18 (footnote omitted).

many states have afforded the protection against gender-based peremptory strikes. There is no evidence that this protection has led to the demise of the peremptory challenge or would pose unworkable administrative difficulties. Indeed, the United States – a major litigator – supports this protection against gender-based peremptory strikes.

While the State predicts that there will be difficulties in determining what constitutes a *prima facie* case or determining what constitutes a violation of this constitutional principle, these are matters that appropriately should be left in the first instance to the discretion of the trial court. In Alabama, the Supreme Court has articulated at least nine factors that are relevant to this inquiry. *See Harrell v. State*, 555 So. 2d 263, 266-67 (Ala. 1989); *Ex parte Branch*, 526 So. 2d 609, 622-23 (Ala. 1987). There is no reason to believe that the prohibition of gender-based strikes would require a modification of such an inquiry. Even if a modification becomes necessary, there is no reason to believe that the federal and state trial courts can not adapt such modifications to the trial process.

The State further asserts that Alabama's particular "struck jury" method of choosing juries would somehow complicate the application of *Batson* to gender-based peremptory strikes. In the first place, the State's choice of jury selection methods can not insulate it from the strictures of the Equal Protection Clause. Secondly, Alabama courts have consistently demonstrated the ability to develop *Batson* procedures in the context of this very type of jury selection method. See *Harrell v. State*, 555 So. 2d 263; *Ex parte Branch*, 526 So. 2d 609. Finally, the fact that the numbers of men and women on a jury venire are

approximately equal will not preclude the development of *Batson* procedures. Alabama Courts, for example, are already dealing with this issue in the context of race. The State recognizes that in "[m]any counties" in Alabama it is common for a "venire to be somewhat equally divided between whites and non-whites." (Resp. Br. at 15). In summary, the State's administrative concerns are overstated and, indeed, irrelevant to the threshold question of whether the Equal Protection Clause applies to gender-based peremptory strikes.

ARGUMENT IV

THE EXTENSION OF *BATSON* PRINCIPLES TO GENDER-BASED PEREMPTORY CHALLENGES SHOULD APPLY RETROACTIVELY.

Should this Court determine that gender-based peremptory jury strikes violate the constitutional rights of litigants and jurors, the State's brief argues such holding should then be applied only prospectively, thereby ignoring the State's violation of the Equal Protection Clause in this case. There is no justification for such an application. Neither *Batson*, nor *Powers v. Ohio*, nor *Edmondson v. Leesville Concrete*, nor *Georgia v. McCullum*, were applied purely prospectively. Moreover, this Court held in *Griffith v. Kentucky*, 479 U.S. 314, 320-328 (1987), that the decision in *Batson* would be applied retroactively.

As the state readily points out, the case of *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), could be read as precluding pure prospectivity. Although the Court did not explicitly say so, *Harper* drew heavily on *Griffith v. Kentucky* as support for retroactivity in that case. The ruling in *Griffith*, Justice Thomas noted, rested on "two 'basic norms of constitutional adjudication.' " *Id.*

at 2516 (citation omitted). The first of these norms was that " 'the nature of judicial review' strips [the Court] of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." *Id.* The second was that " 'selective application of new rules violates the principle of treating similarly situated [parties] the same.' " *Id.* Those principles equally apply here.

Still, this Court need not reach the issue of whether pure prospectivity is *ever* appropriate. In this case, retroactivity is warranted. *Griffith v. Kentucky* held that *Batson* was to be applied retroactively. The holding was broader than the *Batson* issue – the Court concluded that *all* "newly declared . . . rule[s]" must be applied retroactively to every criminal case "pending on direct review." *Griffith*, 479 U.S. at 322; *Harper*, 113 S. Ct. at 2516. Since the extension of *Batson* to gender would apply to both criminal and civil cases, lower courts would be required under *Griffith* to apply the extension in criminal cases. It would be anomalous not to also apply it retroactively in civil cases. (Not to mention the problems that would arise in quasi-criminal or quasi-civil cases).

In supporting its plea for prospective application, the State asserts that the extension of *Batson* to gender-based strikes could not have been foreseen by the parties to this litigation. Such is certainly not the case. The judicial momentum for extending the *Batson* principles to gender-based peremptory challenges has been building ever since the *Batson* decision was originally handed down. During the same term as *Batson* the Court handed down its opinion in *Lockhart v. McCree*, 476 U.S. 162 (1986) in which it stated that "the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some

immutable characteristic such as race, *gender*, or ethnic background, undeniably gives rise to an 'appearance of unfairness.' " (emphasis added) *Id.* at 175. At the time of the trial of this cause, the United States District Court for the Ninth Circuit had already determined that the Equal Protection Clause prohibited gender-based peremptory jury strikes. *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992), *aff'g* 913 F.2d 1417 (9th Cir. 1990). Further, three justices of the Alabama Supreme Court filed a dissenting opinion in *Ex parte Murphy*, 596 So. 2d 45 (Ala 1992), *cert. denied*, 113 S. Ct. 86 (1992), urging the Alabama Supreme Court to adopt the position of the Ninth Circuit Court of Appeals. This dissent by Justice Maddox followed his earlier dissent in *Ex parte Fisher*, 587 So. 2d 1039 (Ala. 1991), *cert. denied*, 112 S. Ct. 1486 (1992) handed down on September 13, 1991, more than thirty days prior to the trial in this case, in which he stated that Petitioner's claim that the prosecutor used his peremptory strikes to exclude women from the jury had merit such that he would have granted the Petition for Certiorari. Thus, the State has been on notice that this issue was one in which Petitioner's claims of discrimination would be subject to review by the appellate courts.

The State attempts to further support its plea for prospective application of the extension of *Batson* to gender-based peremptory challenges by alluding to the purported plight of the mother and child involved in this case. However, as is so readily pointed out by the State, the petitioner has filed a supersedeas bond in the lower court to secure the payment of all child support payments which may become due during the pendency of these proceedings.

Therefore, the State has shown no justification for making the extension of the *Batson* principles to gender-based peremptory strikes prospective only. Upon remand, this Court may order the trial court to conduct a hearing based upon the same or similar principles applicable to objections to race-based peremptory challenges.

CONCLUSION

Gender-based peremptory jury challenges are discriminatory and as such violate the Equal Protection Clause of the Fourteenth Amendment. Despite the State's claim that an extension of *Batson* to gender-based jury strikes will result in administrative difficulties for the court system, such need for administrative convenience will not support the discriminatory use of peremptory challenges. The State's proffered interest in establishing paternity is not well supported and can not be used as the basis for denying Petitioner the equal protection of the law. Gender discrimination in the selection of a jury, like racial discrimination, has no place within the judicial system. The decision below should therefore be reversed and remanded with such instructions as the Court deems appropriate.

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